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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AD15

[Public Notice: 7920]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category IX.

AGENCY: Department of State.

ACTION: Proposed Rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category IX (military training equipment) of the U.S. Munitions List (USML) to describe more precisely the materials warranting control on the USML. The revisions to this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at <http://www.state.gov/documents/organization/181028.pdf>.

DATES: The Department of State will accept comments on this proposed rule until [insert date 45 days from date of publication in the *Federal Register*].

ADDRESSES:

Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: DDTCResponseTeam@state.gov with the subject line, "ITAR Amendment – Category IX."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AD15).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmdtdtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792; e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category IX.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The items subject to the jurisdiction of the ITAR, *i.e.*, “defense articles,” are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730-774, which includes the Commerce Control List (CCL) in Supplement No. 1 to Part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and

reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (see "Commerce Control List: Revising Descriptions of Items and Foreign Availability," 75 FR 76664 (December 9, 2010) and "Revisions to the United States Munitions List," 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of a "bright line" between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with U.S. allies, enhancing the defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end-uses, and end-users of greater concern than NATO allies and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and

aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and reexporters. For example, until the entire USML was revised and became final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Revision of Category IX

This proposed rule would revise USML Category IX, covering military training equipment, to further the national security objectives set forth above and to more accurately describe the articles within the category in order to establish a "bright line" between the USML and the CCL for the control of these articles.

The title of the category is changed to indicate that it covers training equipment only. Training on a defense article would be a defense service covered under the category in which the defense article is enumerated.

Paragraph (a) is to list all the types of training equipment covered in the category.

Paragraph (b) is also revised to more specifically describe the items (simulators) controlled therein. Radar target generators are to be controlled in Category XI(a). Infrared scene generators are to be controlled in Category XII(c).

Tooling and production equipment, currently controlled in paragraph (c), are to be covered on the CCL in proposed ECCN 0B614.

The most significant aspect of this more positive, but not yet tiered, proposed USML category is that it does not contain controls on all generic parts, components, accessories, and attachments (currently captured in paragraph (d)) that are in any way specifically designed or modified for a defense article, regardless of their significance to maintaining a military advantage for the United States. These items are to be subject to the new 600 series controls in Category 0 of the CCL, to be published separately by the Department of Commerce. Parts, components, accessories, or attachments of a simulator that are common to the simulated system or end-item are to be controlled under the same USML Category or CCL ECCN as the parts, components, accessories, and attachments of the simulated system or end-item.

Definition for Specially Designed

Although one of the goals of the export control reform initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term “specially designed.” It is, therefore, necessary for the Department to define the term. Two proposed definitions have been published to date.

The Department first provided a draft definition for “specially designed” in the December 2010 ANPRM (75 FR 76935) and noted the term would be used minimally in the USML, and then only to remain consistent with the Wassenaar Arrangement or other multilateral regime obligation or when no other reasonable option exists to describe the control without using the term. The draft definition provided at that time is as follows: “For the purposes of this Subchapter, the term ‘specially designed’ means that the

end-item, equipment, accessory, attachment, system, component, or part (*see* ITAR §121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML.”

The Department of Commerce subsequently published on July 15, 2011, for public comment, the Administration’s proposed definition of “specially designed” that would be common to the CCL and the USML. The public provided more than 40 comments on that proposed definition on or before the September 13 deadline for comments. The Departments of State, Commerce, and Defense are now reviewing those comments and related issues, and the Departments of State and Commerce plan to publish for public comment another proposed rule on a definition of “specially designed” that would be common to the USML and the CCL. In the interim, and for the purpose of evaluation of this proposed rule, reviewers should use the definition provided in the December ANPRM.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following:

1) A key goal of this rulemaking is to ensure the USML and the CCL together control all the items that meet Wassenaar Arrangement commitments embodied in Munitions List Category 14 (WA-ML14). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category IX contained in this notice

and the new Category 0 ECCNs published separately by the Department of Commerce when reviewed together.

2) The key goal of this rulemaking is to establish a “bright line” between the USML and the CCL for the control of these articles. The public is asked to provide specific examples of articles whose jurisdiction would be in doubt based on this revision.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from §553 (Rulemaking) and §554 (Adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400-AC78), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes

the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: 1) Statement of Registration, DS-2032, OMB No. 1405-0002; 2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP-5, OMB No. 1405-0003; 3) Application/License for Temporary Import of Unclassified Defense Articles, DSP-61, OMB No. 1405-0013; 4) Nontransfer and Use Certificate, DSP-83, OMB No. 1405-0021; 5)

Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP-85, OMB No. 1405-0022; 6) Application/License for Temporary Export of Unclassified Defense Articles, DSP-73, OMB No. 1405-0023; 7) Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services, OMB No. 1405-0025; 8) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP-94, OMB No. 1405-0051; 9) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP-6, -62, -74, -119, OMB No. 1405-0092; 10) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP-5, OMB No. 1405-0093; 11) Maintenance of Records by Registrants, OMB No. 1405-0111; 12) Annual Brokering Report, DS-4142, OMB No. 1405-0141; 13) Brokering Prior Approval (License), DS-4143, OMB No. 1405-0142; 14) Projected Sale of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act, DS-4048, OMB No. 1405-0156; 15) Export Declaration of Defense Technical Data or Services, DS-4071, OMB No. 1405-0157; 16) Request for Commodity Jurisdiction Determination, DS-4076, OMB No. 1405-0163; 17) Request to Change End-User, End-Use, and/or Destination of Hardware, DS-6004, OMB No. 1405-0173; 18) Request for Advisory Opinion, DS-6001, OMB No. 1405-0174; 19) Voluntary Disclosure, OMB No. 1405-0179; and 20) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405-0195. The Department of State believes there will be minimal changes to these collections. The Department of State believes the combined effect of all

rules to be published moving commodities from the USML to the EAR as part of the Administration's Export Control Reform would decrease the number of license applications by approximately 30,000 annually. The Department of State is looking for comments on the potential reduction in burden.

List of Subjects in Part 121

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is proposed to be amended as follows:

PART 121 – THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List Category IX to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category IX—Military Training Equipment

(a) Training equipment, as follows:

- (1) ground, surface, submersible, space, or towed airborne targets that:
 - (i) have an infrared, radar, acoustic, magnetic, or thermal signature that mimic a specific defense article, other item, or person; or
 - (ii) are instrumented to provide hit/miss performance information;

Note to paragraph (a)(1): Target drones are controlled in Category VIII(a).

(2) devices that are mockups of articles enumerated in this subchapter used for maintenance training or disposal training for ordnance enumerated in this subchapter;

(3) air combat maneuvering instrumentation and ground stations therefor;

(4) physiological flight trainers for fighter aircraft or attack helicopters;

(5) radar trainers “specially designed” for training on radars controlled by Category XI;

(6) training devices “specially designed” to be attached to a crew station, mission system, or weapon of an article controlled in this subchapter;

Note to paragraph (a)(6): This paragraph includes stimulators that are built-in or add-on devices that cause the actual equipment to act as a trainer.

(7) anti-submarine warfare trainers;

(8) missile launch trainers;

(9) any training device that:

(i) is classified;

(ii) contains classified software;

(iii) is manufactured using classified production data; or

(iv) is being developed using classified information.

“Classified” means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government.

Note to paragraph (a): Training equipment does not include combat games without item signatures or tactics, techniques, and procedures covered by this subchapter.

(b) Simulators, as follows:

(1) system specific simulators that replicate the operation of an individual crew station, a mission system, or a weapon of an end-item that is controlled in this subchapter;

(2) [Reserved]

(3) [Reserved]

(4) software and associated databases not elsewhere enumerated in this subchapter that can be used to simulate the following:

(i) trainers specified by this category;

(ii) battle management;

(iii) military test scenarios/models; or

(iv) effects of weapons enumerated in this subchapter;

(5) simulators that:

(i) are classified;

(ii) contain classified software;

(iii) are manufactured using classified production data; or

(iv) are being developed using classified information.

“Classified” means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government.

(c) [Reserved]

(d) [Reserved]

(e) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (b) of this category.

(f) [Reserved]

Note: Parts, components, accessories, or attachments of a simulator that are common to the simulated system or end-item are controlled under the same USML Category or CCL ECCN as the parts, components, accessories, and attachments of the simulated system or end-item.

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June 7, 2012

(Date)

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